United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-2015

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRUZ ESCOBAR-NEGRON,

Appellant,

-against-

UNITED STATES OF AMERICA,

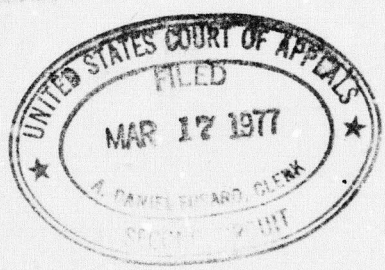
Appellee.

Docket No. 77-2015

B
P/S

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRUZ ESCOBAR-NEGRON, Appellant, -against- UNITED STATES OF AMERICA, Appellee.	Docket No. 77-2015

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether Rule 11, Fed.R.Cr.P., and due process were violated by Judge Costantino's failure to inform appellant that "intent to distribute" was an essential element of the crime to which he was pleading.

2. Whether the guilty plea must be vacated because Judge Costantino violated Rule 11 by failing to inform appellant that he was subject to a mandatory special parole term and because the omission cannot be rendered harmless by a subsequent sentence reduction.

3. Whether due process was violated in sentencing appellant because Judge Costantino relied on erroneous information indicating appellant's non-addiction and refused to allow appellant an opportunity to correct the error.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Costantino, J.) entered January 13, 1977, denying appellant Cruz Escobar-Negron's application pursuant to 28 U.S.C. §2255 for a writ of habeas corpus. The writ sought to vacate judgment rendered on April 13, 1973 in the same court pursuant to a plea of guilty to one count of possession with intent to distribute heroin (21 U.S.C. §841(a)(1)) and sentencing appellant to a 12-year term of imprisonment and a five-year period of special parole.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel to Mr. Negron on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

In a pro se application pursuant to 28 U.S.C. §2255, appellant sought to vacate his plea of guilty to one count of possession with intent to distribute heroin, in violation of 21 U.S.c. §841(a)(1). In his petition, appellant challenged the plea on the grounds that the failure to inform him of the consequences of the plea and the nature of the crime to which he was pleading deprived him of due process. In addition, appellant challenged

the sentence imposed, because he was not permitted to present evidence to counter the erroneous fact finding of non-addiction upon which the sentence was based. This appeal is from the denial of the petition.

A. The Plea Proceeding

Appellant, who was 24 years old at the time of the plea, and a native of Puerto Rico, was indicted along with Lydia Guzman, his common-law wife.

On February 20, 1973, before The Honorable Mark A. Costantino, appellant sought to withdraw a previously entered plea of not guilty, and to enter a plea of guilty to the one-count indictment (Appendix C at 3*). Defense counsel stated for the record that appellant was making this offer in light of the Assistant United States Attorney's agreement to seek permission from the Justice Department to dismiss the charges against Lydia Guzman, appellant's wife and co-defendant (Appendix C at 4-5).

The specific crime to which appellant was willing to plead was not identified anywhere during the course of the proceeding. Nor did Judge Costantino read the indictment, recite the statute charged, or explain the elements of the crime to appellant. In-

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*The transcript of the plea proceeding is annexed as "C" to the separate appendix to appellant's brief.

deed, without any discussion of the crime, Judge Costantino focused the proceeding on enumerating the rights appellant would waive by pleading guilty (Appendix C at 5-6), and then on establishing a factual basis for the plea. However, this inquiry elicited only that appellant, who was addicted to heroin, had caused his wife to attempt to transport heroin to Puerto Rico for him. The district judge failed to ask appellant whether he intended to distribute the drug, or indeed what he intended to with it:

> THE COURT: Now, before the Court accepts the plea, you must tell me in your own words what you say you have done wrong in violation of the United States law. What did you do?
>
> THE DEFENDANT NEGRON: I tell you the truth. I plead guilty because I know I did a crime --
>
> THE COURT: Just tell me what you did.
>
> THE DEFENDANT NEGRON: I forced my wife to possess narcotics and take it to Puerto Rico for me.
>
> THE COURT: What kind?
>
> THE DEFENDANT NEGRON: Heroin.
>
> THE COURT: Do you remember how much?
>
> THE DEFENDANT NEGRON: I don't -- about five ounces. I passed this because I use narcotics. You study my case and see if I can go to the hospital.
>
> (Appendix C at 6-7).

The subsequent inquiry concerning appellant's knowledge at the time of the crime revealed only that appellant knew it was wrong to possess heroin and wrong to distribute it, but again did

not establish that he intended to distribute the drug, the crime for which he had been indicted:

> THE COURT: All right. Let's see now. Now, at this time you had this heroin and your wife was a party to it. You knew that it was wrong to possess heroin?
>
> THE DEFENDANT NEGRON: Yes sir.
>
> THE COURT: And to distribute heroin?
>
> THE DEFENDANT NEGRON: Yes sir.
>
> THE COURT: And you knew it was a violation of the laws of the United States?
>
> THE DEFENDANT NEGRON: Yes sir.
>
> THE COURT: And you knew it was a crime?
>
> THE DEFENDANT NEGRON: Yes sir.
>
> THE COURT: And you knew that crime could subject you to a jail term, right?
>
> THE DEFENDANT NEGRON: Yes.
>
> (Appendix C at 8).

Throughout the plea proceedings, appellant's primary concern was that after his plea he receive treatment for his addiction. According to appellant, his possession of this heroin was the product of his addiction. He told Judge Costantino that he had been addicted for approximately 10 years, since he was 13 or 14 years old (Appendix C at 7, 9). When the district judge inquired as to whether appellant would object to being examined to determine if he was an addict, appellant responded, "Oh, no sir. I have no objection" (Appendix C at 8). Indeed, defense counsel specifically requested that the court consider the pos-

sibility of a sentence under the Narcotic Addicts Rehabilitation Act (Appendix C at 10).

Judge Costantino agreed to consider that sentencing alternative if an examination supported the finding of addiction. He also attempted to inform appellant of the other possible penalties to which he was subject:

> THE COURT: ... You are subject to a $25,000.00 fine and up to 15 years in jail or both with a special parole term. That is the maximum. That is all in the Court's discretion as to what happens to you. Do you understand that?
>
> THE DEFENDANT NEGRON: Yes.
>
> (Appendix C at 9).[2]

Nowhere did the judge define special parole term; nor did he tell appellant that the special parole term was for a mandatory minimum of three years and that it was without statutory maximum.

Judge Costantino accepted the plea and directed appellant to cooperate with the probation department (Appendix C at 9-10).

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[2]The judge also told appellant that, because he was 24 years old, he was also liable for sentence under the Youth Corrections Act (Appendix C at 9).

B. The Sentencing Proceeding[3]

Defense counsel did not see the presentence report until the sentencing proceeding had already begun. Then Judge Costantino showed counsel the report to refute the defense assertion that appellant had only one prior conviction (Appendix D at 3-4). The report[4] revealed that appellant had an extensive history of prior petty offenses, mostly burglaries and petty larcenies, beginning when appellant was 16 years old.[5] The report also revealed that appellant asserted that the heroin involved in this case was for his own personal use. The report emphasizes that appellant denied possessing these drugs for distribution.[6]

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[3]The transcript of the sentencing proceeding is annexed as "D" to the separate appendix to appellant's brief.

[4]The report was made available to appellate counsel, who reviewed it in the office of the United States Probation Department for the Eastern District of New York. This Court is invited to review the report and make it part of the record on appeal. See United States v. Robin, 545 F.2d 775, 778 n.10 (2d Cir. 1976).

[5]The report reveals one prior federal conviction in 1968 for forgery. Appellant received a three-year term of imprisonment and was incarcerated at the Federal Penitentiary at Atlanta, Georgia.

[6]Notes taken when appellate counsel reviewed the presentence report reveal that, at page 4 of the section delineated "Defendant's Statement," the probation officer noted that the defendant admitted his guilt of the crime, but that he maintained he had been addicted since he was 13 years old and that the heroin found in the possession of his wife was for his own personal use, not for distribution.

According to the probation officer, this denial of intent to distribute contradicted appellant's original statement at

(Footnote continued on the following page)

Defense counsel argued to the judge that appellant's prior criminal activity was the result of his addiction. Counsel urged that, in light of appellant's drug problem, his age, and his devotion to his wife and two children, the court should impose a sentence that would help appellant overcome his addiction (A-pendix D at 6-7).

Appellant personally reaffirmed that he was an addict, and asked the court to sentence him to a drug program:

> THE DEFENDANT: Well, I know I make a lot of mistakes in my life. But I am positive, all my mistakes is because I am being using drugs. If I am not using drug, I know all that crime I committed, I no commit it before.
>
> I got my children, I love too much my children and my wife. I would like your Honor to give me a chance for the hospital, because I know in a hospital I can make better for my mind, you know, because in the penitentiary, I be there before in Atlanta, and all I got to watch over there, I am too young, I got to watch everybody over there, because, you know, they know I am too young when they send me over there.
>
> (Appendix D at 7-8).

In response to this statement, a probation officer, whose appearance was not noted for the record, volunteered to refute the fact of appellant's current addiction. Although the pre-

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(Footnote continued from the preceding page)

the time of his arrest when he indicated that he was going to sell part of the heroin. The report also notes that appellant admitted that he came to the United States to purchase the heroin because he was having difficulty getting drugs in Puerto Rico, and that he used 25 to 30 "decks" of heroin daily, at a cost of $5 per "deck."

sentence report was silent as to any examinations performed to determine addiction, and indeed only restated appellant's own assertions of present addiction, this unidentified probation officer asserted that at the time of appellant's arrest he had denied being an addict and that the authorities at the Federal Detention Headquarters did not classify him as an addict (Appendix D at 8).

Appellant's attempt to prove his addiction by displaying the track marks on his arm was to no avail. Similarly futile were counsel's requests to permit the defense to have appellant examined to establish addiction. Instead, Judge Costantino, from his vantage point on the bench, viewed the track marks on appellant's arm and found them to be old marks (Appendix D at 8-9).

In imposing sentence, the court stated:

> Five and a half ounces of heroin is enough for anybody to be put away. They complain about one ounce of heroin. Five and a half ounces is a lot of heroin.
>
> He was going into the business and he intended to stay in that business. His record is replete with all of his background, and it may very well be petty larceny was started out in order to get monies to take care of his habit, but then he graduated.
>
> He finally graduated. He was going to help everybody else, too, by selling it. He is a graduate. I am coining all new words this morning, he is a graduate, that's what he is.
>
> * * *
>
> He went from the user to the graduate school of the pusher, and that's what he is.

This Court is ready to sentence him.

This Court sentences him to twelve years in jail and five years special parole.

(Appendix D at 9-10).

At the close of the proceeding, counsel asked that appellant be given 30 days in which to appeal. The reason additional time was needed, counsel explained, was to allow appellant to obtain new counsel, since his present lawyer would not undertake to represent him on appeal.

On advice of the Assistant United States Attorney, Judge Costantino informed appellant that, having pleaded guilty, he had no right to appeal, and could only move to modify the sentence (Appendix D at 11).

C. The Opinion Below

On January 29, 1975, appellant filed a petition pursuant to 28 U.S.C. §2255, challenging his conviction on the grounds that Judge Costantino's failure to inform him of the consequences of his plea and the elements of the crime to which he had pleaded violated Rule 11, Federal Rules of Criminal Procedure and due process. Appellant also challenged the validity of his sentence, on the ground that he was denied an opportunity to prove that the finding that he was not an addict was erroneous.

On January 12, 1976, Judge Costantino denied the petition insofar as it sought to vacate the plea, and granted it to the extent that the special parole term was reduced from five years to three.

In a three-page memorandum and order[7] in which he misstated that appellant had been convicted of 21 U.S.C. §891(a)(1), Judge Costantino stated that extensive discussion with appellant at the time the plea was entered insured that it was voluntarily made; that, in light of the sentence reduction, the failure to inform appellant of the special parole term was harmless error; and that there was sufficient medical evidence at sentencing to support the conclusion that appellant was not an addict.

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[7]The memorandum and order is annexed as "B" to the separate appendix to appellant's brief.

ARGUMENT

Point I

RULE 11 AND DUE PROCESS WERE VIOLATED BY JUDGE COSTANTINO'S FAILURE TO INFORM APPELLANT THAT "INTENT TO DISTRIBUTE" WAS AN ESSENTIAL ELEMENT OF THE CRIME TO WHICH HE WAS PLEADING.

When appellant pleaded guilty on February 20, 1973, Rule 11 of the Federal Rules of Criminal Procedure then provided, in pertinent part:[8]

> ... The court ... shall not accept such plea [of guilty] without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge....

McCarthy v. United States, 394 U.S. 459, 464-467 (1969), made clear that Rule 11 was to be literally applied. The rule allowed no room for mere "assumptions" that a pleading defendant understood the charge against him; rather, Rule 11 required that the judge establish, on the record, through his personal inquiry of the defendant, that the latter understood the nature of the charge. McCarthy v. United States, supra, 394 U.S. at 469-470. In Irizarry v. United States, 508 F.2d 960, 964-966 (2d Cir. 1974), this Court explained that a §2255 petition must be granted and a plea vacated unless the record contains, at minimum (1) identification of the crime involved; (2) the "bare bones elements of the offense;" and (3) evidence that the defendant under-

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[8]Effective December 1, 1975, Rule 11 now requires a more explicit and detailed procedure before a plea can be properly taken. United States v. Journet, 544 F.2d 633 (2d Cir. 1976).

stood the charge. Absence of any one of these factors requires that the plea be set aside. Irizarry v. United States, supra, 508 F.2d at 966. In this case, where all three factors are missing, vacature of the plea is compelled. McCarthy v. United States, supra; Irizarry v. United States, supra.

Nowhere in the plea proceeding did Judge Costantino identify the crime to which appellant was pleading; incredibly, the statute 21 U.S.C. §841(a)(1) is not even mentioned anywhere in the record below. Moreover, although neither appellant nor counsel waived a reading of the indictment, no reading of that document preceded an acceptance of the plea, nor was the statute recited to appellant before he was asked to describe what he had done. Omission of this recitation leaves the record devoid of any indication that notice of the nature of the crime was given to appellant.

Title 21 U.S.C. §841(a)(1), the crime with which the indictment reveals appellant was charged, requires a finding of knowing possession of the controlled substance and an intent to distribute the drug to another. "Distribution" means "to deliver" (21 U.S.C. §802(11)), and, within the statutory scheme of the Comprehensive Drug Abuse Prevention and Control Act of 1970, that requires that the transfer be a link in the chain of distribution to others. United States v. Swiderski, Doc. No. 76-1415, slip op. 1627, 1634 (2d Cir., February 1, 1977). The problem in this case is that Judge Costantino never articulated the fact that these elements had to be satisfied before a plea

could be validly taken. In particular, the record omits any evidence to establish notice that intent to distribute was an essential element of the crime.

Absent, as well, is any indication that appellant understood the nature of the crime. Nowhere was he specifically asked, nor did he volunteer that he had the requisite comprehension of the crime.

This void was not compensated for by the judge's inquiry concerning whether appellant knew when he possessed the drugs that it was wrong to distribute them. That knowledge was not tantamount to the required intent to distribute, nor to a realization that intent was an element of the crime. Similarly, appellant's statement that he "passed this" because he is an addict is insufficient. On this record, this street vernacular will not support a finding that appellant understood what "intent to distribute" requires under the statute.

Indeed, what this record establishes is that the plea was taken in violation of due process because appellant was unaware that the plea required an admission that he intended to distribute the drugs. Henderson v. Morgan, 426 U.S. 637, 645 (1976). In that case, the Supreme Court reaffirmed that even overwhelming evidence of guilt and competent advice to plead will not compensate for a failure to appreciate the nature of the charge. An incomplete understanding of the charge precludes an intelligent admission of guilt:

> [C]learly the plea could not be voluntary in the sense that it constituted an intelligent

> admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."
>
> Henderson v. Morgan, supra, 426 U.S. at 645, quoting Smith v. Grady, 312 U.S. 329, 334 (1941).

Appellant's actual ignorance of the requirement that he intended to distribute the drugs is revealed in the presentence report Judge Costantino reviewed before he imposed sentence. In the report, appellant simultaneously "admitted his guilt" of the crime and denied that he ever intended to distribute the drugs. The inconsistency establishes that, after the plea, appellant simply failed to apprehend that, in order to be guilty, he had to intend to distribute the drugs.

Nothing on the record of the plea contradicts appellant's patent ignorance of the nature of the crime. His statement at the time of entering the plea that "I pass this because I use narcotics" obviously refers to the transfer of the drugs to his wife, who was to take the drugs to Puerto Rico. In light of the subsequent assertion in the presentence report that the heroin was for his personal use, it is clear that the wife's activity was aiding appellant's simple possession for personal use, and that does not constitute a crime under &841(a)(1). See United States v. Swiderski, supra.

The failure to notify appellant of the nature of the charge violates both Rule 11 and due process, and the plea of guilty must be vacated.

Point II

THE GUILTY PLEA MUST BE VACATED BECAUSE JUDGE COSTANTINO VIOLATED RULE 11 BY FAILING TO INFORM APPELLANT THAT HE WAS SUBJECT TO A MANDATORY SPECIAL PAROLE TERM AND THE OMISSION CANNOT BE RENDERED HARMLESS BY A SUBSEQUENT SENTENCE REDUCTION.

All parties agree that Judge Costantino failed to inform appellant of the consequences of his plea; to wit, the additional special parole term which must follow any period of incarceration under 21 U.S.C. §841(a)(1). All that the trial judge said about possible penalties was:

> "...you are subject to a $25,000.00 fine and up to 15 years in jail or both with a special parole term. That is the maximum. That is all in the court's discretion as to what happens to you."

This statement not only failed to explain the meaning of special parole to appellant, it also failed to inform him that after a prison term there was a mandatory term of special parole that was for a minimum of three years and without statutory maximum. The sentence subsequently imposed on appellant -- a 12-year period of incarceration followed by a five year period of special parole -- exceeded by two years the maximum penalty of which he had notice. Despite this clear violation of Rule 11, Judge Costantino refused to vacate the plea.

Rule 11, in effect when appellant pleaded guilty, provided that before a plea can be taken the trial judge must inform

the defendant of the consequences of his plea. McCarthy v. United States, supra, 394 U.S. 459; Ferguson v. United States, 513 F.2d 1011 (2d Cir. 1975); Michel v. United States, 507 F.2d 461 (2d Cir. 1974); Bye v. United States, 435 F.2d 177 (2d Cir. 1970). This is so because, a defendant who pleads guilty relinquishes substantial constitutional rights -- trial by jury, confrontation of witnesses, and the privilege against self-incrimination -- and in order to validly waive these rights he must understand the full effect of his actions. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

"Consequences" as that word is used in Rule 11 includes the maximum penalty to which a defendant is exposed by his plea.[9] Arthur Guy Eagle Thunder v. United States, 477 F.2d 1326 (8th Cir. 1973); United States v. Frontero, 452 F.2d 406 (5th Cir. 1971); Bye v. United States, supra, 435 F.2d at 180.

In this circuit, the mandatory special parole term, since it adds time to a regular sentence, is a consequence of the plea. Ferguson v. United States, supra, 513 F.2d at 1012; Michel v. United States, supra, 507 F.2d at 463. Other circuits are in accord. Roberts v. United States, 491 F.2d 1236 (3d Cir. 1974); United States v. Richardson, 483 F.2d 516, 518-519 (8th Cir. 1973). But see, Bachner v. United States, 517 F.2d 589

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[9]Now Rule 11 explicitly requires that the judge inform the defendant of both the minimum and maximum sentence possible. United States v. Journet, supra, 544 F.2d at

597 (7th Cir. 1975).

Notice of the liability incurred by pleading guilty must appear in the record of the plea proceeding. McCarthy v. United States, supra, 394 U.S. at 470; United States v. Richardson, 483 F.2d at 519. Precision in the record assures that the judge can better ascertain the voluntariness of the plea. Therefore, "prejudice inheres in a failure to comply with Rule 11 for noncompliance deprives the defendant of the Rule's procedural safeguards." McCarthy v. United States, supra, 394 U.S. at 471-472.

The remedy for this deficiency in the record is a vacatur of the plea and an opportunity to plead anew. McCarthy v. United States, supra, 394 U.S. at 468-472; Ferguson v. United States, supra, 513 F.2d at 1012; Irizarry v. United States, supra, 508 F.2d at 966; Roberts v. United States, supra, 491 F.2d at 1238; United States v. Richardson, supra, 483 F.2d 516.

In response to appellant's §2255 proceeding seeking vacatur of the plea Judge Costantino reduced the special parole term by two years and then found his error of omission to be harmless, nunc pro tunc. This tactic thwarts the entire purpose of Rule 11: to insure, inter alia, that there was a knowing and intelligent waiver of constitutional rights at the time the defendant seeks to make that waiver. McCarthy v. United States, supra, 394 U.S. at 466.

Judge Costantino's attempt to circumvent the clear message of McCarthy, Ferguson and Bye, must fail. In Ferguson, as in

the instant case, the sentence imposed was two years greater than the term about which the defendant had been told. This Court in granting the writ, remanded stating:

> "One not so advised must be given the opportunity to plead anew."
>
> Ferguson v. United States, 513 F.2d at 1012.

Significantly, this Court did not even suggest that reduction of the sentence was an alternative remedy to vacatur of the plea.[10] See also, Roberts v. United States, supra, 491 F.2d 1238 and United States v. Richardson, supra, 483 F.2d 516 where the plea was vacated despite the fact that the prison term plus special parole term actually imposed was substantially less than the erroneous maximum sentence announced at the time of the plea.

The logic of these decisions is obvious. Assessment of a knowing and intelligent waiver must be made at the time that the plea was taken. Bye v. United States, supra, 435 F.2d at 180; Durant v. United States, 410 F.2d 689, 691 (1st Cir. 1969). One essential factor in the determination is whether the defendant then understood the full extent to which he could be punished. Without that knowledge his decision to waive a trial and admit guilt cannot be knowing and intelligent.

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[10] Bell v. United States, 521 F.2d 713, 715 (4th Cir. 1975) is not to the contrary. In Bell, the Court reaffirmed that "permission to withdraw the plea is imperative" when the actual sentence exceeds the maximum sentence he was told he could receive. Neither Aviles v. United States, 405 F.Supp 1374 (S.D.N.Y. 1975) nor Poeria v. United States, 405 F.Supp 1258 (E.D.N.Y. 1975), relied on by the District Court below, are persuasive. Aviles relies solely for its harmless error argument on Bell v. United States, supra, and in Poeria, the court found that the defendant had been adequately informed of the special parole term.

That the sentence actually imposed, does not exceed the maximum of which a pleading defendant had notice cannot nunc pro tunc affect the adequacy of his knowledge at the time of the plea. Despite subsequent events, the defendant didn't know at the time of the plea, what he was getting into and that renders the plea invalid.

This Court, on facts analogous to those presented in this case, has already found that the harmless error rule cannot apply to this type of Rule 11 violation. Bye v. United States, supra, 435 F.2d at 180. In Bye, the error was the failure to inform the pleading defendant that he would be ineligible for parole. The Government argued that the defendant was not prejudiced since the maximum release date on the sentence actually imposed would occur sooner than a parole release date for the maximum sentence that the defendant knew to be possible. This Court rejected that argument finding determinative the fact that had ineligibility been "known to [the accused] prior to entering his guilty plea, he may [have] decide[d] not to plead guilty at all, in view of the greater perceived risks* of lengthy imprisonment." (Emphasis added.) Bye v. United States, supra, 435 F.2d at 180.

The First Circuit, also in the context of parole ineligibility, stated, in language clearly applicable to this case,

> "Under Rule 11 the defendant is entitled to know the consequences of his plea before entering it. This mandate is not nor can it be satisfied by hindsight reasoning comparing the actual sentence with what it could have been. The language of the rule is clearly designed

> to assess the risk that he is taking by entering a plea of guilty."
>
> Durant v. United States, supra, 410 F.2d at 691-692.

Moreover, in this case the possibility that the subsequent sentence reduction could correct the error was precluded by what Judge Costantino actually said at the plea proceeding. The context in which the judge mentioned the words special parole created the misleading impression about what special parole is and its effect on the sentence. He said:

> You are subject to a $25,000.00 fine and up to 15 years in jail or both with a special parole term.

and thereby conveyed the impression, to the uninformed, that special parole would somehow reduce, not increase the maximum possible period of incarceration.

Significantly, the Government below did not even suggest the harmless error concept for avoiding vacatur of the plea. Instead, the Government contended that while appellant would have been entitled to relief on direct appeal that relief was not available by way of a §2255 proceeding. This argument is without merit. United States v. Ferguson, supra, 513 F.2d at 1012; Roberts v. United States, supra, 491 F.2d 1236; United States v. Richardson, supra, 483 F.2d 516, are all §2255 proceedings. See also, Irizarry v. United States, supra, 508 F.2d at 966; Bye v. United States, supra, 435 F.2d 177.

Moreover, on the record in this case, the Government's posi-

tion is, at best, disingenuous. Appellant's failure to appeal is the direct result of misinformation which originated with an Assistant United States Attorney who inspired Judge Costantino to tell appellant that, having pleaded guilty, he had no right to appeal. Because appellant was denied a right to appeal by the incorrect information he received from the trial judge, his §2255 should be treated as though it were a direct appeal.

The failure to inform appellant of the consequences of his guilty plea require that the plea be vacated and appellant be allowed to plea anew.

POINT III

DUE PROCESS WAS VIOLATED IN SENTENCING APPELLANT BECAUSE JUDGE COSTANTINO RELIED ON ERRONEOUS INFORMATION INDICATING APPELLANT's NON-ADDICTION AND HE REFUSED TO ALLOW APPELLANT AN OPPORTUNITY TO CORRECT THE ERROR.

The record below reveals that the length of the sentence imposed in this case was a direct result of Judge Costantino's reliance on his mistaken belief that appellant was not an addict, a fact which appellant challenged and which he was not permitted to rebut with evidence.

In sentencing appellant the judge stated:

> "...He was going into the business and he intended to stay in that business. His record is replete with all of his background, and it may very well be petty larceny was started out in order to get monies to take care of his habit, but then he graduated.
>
> He finally graduated. He was going to help ever body else, too, by selling it. He is a graduate. I am coining all new words this morning, he is a graduate, that's what he is.
>
> * * *
>
> He went from the user to the graduate school of the pusher, and that's what he is. This Court is ready to sentence him.
>
> This Court sentences him to twelve years in jail and five years special parole."

The problem here is that the finding of non-addiction was based on the hearsay allegation and superficial observation of an unidentified probation officer. During the sentencing proceeding, for the first time, this officer asserted that records at the Federal Detention Headquarters did not classify appellant as an addict. The record does not reveal the source or basis of the probation officer's information, nor the validity of the so-

called classification at the Detention Headquarters. Indeed, the posture taken by the probation officer at sentence is surprising in light of the fact that the presentence report nowhere takes issue with appellant's consistant claim of drug addiction, and is silent as to any medical examinations conducted to assess appellant's addiction.

Despite the lack of support for the finding of non-addiction Judge Costantino rejected all defense attempts to refute the finding. The track marks on appellant's arms were ignored because the judge, whose expertise in this matter is no where revealed, found that the marks were "old tracks." Of course, classification as an addict requires an extensive examination (see 18 U.S.C. §4252) and one so superficial is useless. Nonetheless, the defense request for an opportunity to have appellant submit to an examination was also inexplicably denied.

A sentence imposed in reliance on false or incorrect information violates due process. United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736, 740-741 (1948); United States v. Robin, 545 F.2d 775 (2d Cir. 1976); United States v. Stein, 544 F.2d 96 (2d Cir. 1976); United States v. Malcolm, 432 F.2d 809, 814 (2d Cir. 1970).[11]

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[11]Actual reliance on the erroneous information need not be established; the mere possibility that the errors influenced the sentence requires that the sentence be vacated. McGee v. United States, 462 F.2d 243, 245-247 (2d Cir. 1972).

The importance of accurate information for the purpose of sentencing mandates that when a defendant challenges the accuracy of relevant information, he must be given an adequate opportunity to rebut the errors. United States v. Robin, supra, 545 F.2d at 781 (1976); United States v. Stein, supra, 544 F.2d at 102-103; United States v. Rosner, 485 F.2d 1213, 1229-1231 (2d Cir. 1973); United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973). Rule 32(a)(1) specifically requires that a defendant be given an opportunity to present facts in mitigation of the sentence.

The sentence must be vacated and the case remanded for resentence.[12]

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[12]Remand to allow repleading or for resentence should be to a different judge. Judge Costantino has already ruled infavorably on the appellant's Rule 35 motion as well as the 2255 petition. Following the "preferred practice" in this circuit, and the concern often expressed for the appearance of justice, appellant should have his case heard by another judge. United States v. Robin, supra, 545 F.2d at 782; United States v. Stein, supra, 544 F.2d at 103; United States v. Rosner, supra, 485 F.2d at 1231; United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974); United States v. Brown, 470 F.2d 285, 288-289 (2d Cir. 1972).

CONCLUSION

For the afore-said reasons the plea should be vacated and the case remanded to give the appellant an opportunity to plead anew; alternatively, the sentence must be vacated and the case remanded for resentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

March 1, 1972

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Sheila Ginsberg